IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1934 OF 2005

IN

COUNTER CLAIM STAMP NO.2508 OF 2004

IN

SUIT NO.1330 OF 2000

Kanayalal M. Thakkar ...Plaintiff

v/s

M/s Shree Padmanabh Builders ...Defendants

Mr T.N. Subramanian with Mr Snehal Shah and Mr Sanjay Korde i/b M/s Purnanand and Co. for Plaintiff.

Mr Abhay Patki i/b Mr Anil Gala for Defendants.

CORAM : D.K. DESHMUKH J.

DATE : 24TH NOVEMBER 2006.

P.C. :-

1. This is a notice of motion taken out by the original plaintiffs who are defendants in the counter claim for dismissal of the counter claim filed by the original defendants on the ground that the decree claimed in the counter claim is barred by the law of limitation. Perusal of the counter claim shows that by prayer clause (a), the defendants who are plaintiffs in the counter claim are claiming a decree of declaration that the plaintiffs are entitled to all rights, title and interest and benefit of suit property and development agreement dated 1st October 1989 and the conveyance of nine shops dated 11th November 1991 and receipts of Rs.1/- lac for balance / residual right of defendants and various power of attorneys dated 1st October 1989, 8th June 1990 and 20th September 1992 read with letter dated 20th June 1994 at Exh.'B' are valid, subsisting and binding on the defendants and defendants have no right, title or interest left in suit property i.e. Survey No.77, Hissa No.10, C.T.S. No.4648 to 4667 admeasuring 4399.25 sq.yds. together with structures standing thereon situated at Village Korole, District of Bombay Suburban District, Kurla, M.G. Road, Ghatkopar (East), Mumbai 400 077 known as Kanjui Khatau Wadi now

known as Parekh Market. By prayer clause (b), the plaintiffs seek a decree of specific performance of the agreement which is referred to in prayer clause (a) i.e. agreement dated 1st October 1989. The relief claimed by prayer clause (c) makes a very interesting reading.

Prayer clause (c) reads as under :-

> "(c) that this Hon'ble Court be pleased to declare that the defendants have no right, title or interest in the suit property in view of the aforesaid agreement and full and final payment made by the plaintiffs to the defendants."

. Thus, by prayer clause (c), the plaintiffs claim a decree of declaration that the defendants have no right, title or interest in the property because they have entered into the agreement and because they have accepted payment from the plaintiffs. One wonders if the defendants do not have any right, title or interest in the property, how can a decree of specific performance be passed against them in relation to the property which they do not own. According to the defendants - original plaintiffs, in the suit, principal relief claimed is a decree of specific performance of the agreement of the year 1989 which was terminated in any case by the defendants - original plaintiffs by

notice dated 24th February 2000 and therefore the suit is barred by the law of limitation. Perusal of the plaint filed by the original plaintiffs in suit No.1330 of 2000 shows that the original plaintiffs are seeking a decree of declaration that the defendants in suit do not have right, title or interest in respect of the additional F.S.I. The plaintiffs are claiming permanent injunction restraining the defendants from making any further construction, entering into any agreement, disturbing possession of the plaintiff and acting on the basis of the power of attorney executed by the plaintiffs. According to the original plaintiffs, the plaintiffs are owners of the property, they had granted development rights in respect of part of the property in favour of the original defendants. Pursuant to that agreement, according to the plaintiffs, construction was carried out by the original defendants. For that purpose, a power of attorney was also executed by the original plaintiffs in favour of the defendants. According to the original plaintiffs, in the month of December 1999, they came to know that the original defendants were intending to take steps contrary to the agreement between the parties. Thereafter, there were some negotiations between the parties, ultimately by letter dated 24th February 2000 they terminated the entire arrangement including the power of attorney and in March 2000, the plaintiffs filed the suit seeking the

reliefs which have been mentioned in the suit. The defendants in that civil suit filed the present counter claim on 18th August 2004. According to the counter claim, the defendants had agreed to sell, transfer and assign all their right, title and interest in the future development of the property to the plaintiffs for utilisation of the balance F.S.I. According to the plaintiffs in the counter claim, there was a writing executed between the parties dated 1st October 1989 to this effect and also another writing of June 1994 confirming the existing arrangement between he parties. According to the plaintiffs in the counter claim, they made full payment to which the defendants in the counter claim were entitled in the year 1993. According to the plaintiffs, the defendants in the counter claim also executed power of attorney in favour of the plaintiffs. In paragraph 16 of the plaint, the plaintiffs in the counter claim state that the defendants in the counter claim have no right, title or interest in the property. According to the plaintiffs in the counter claim, by notice dated 23rd June 2004, the defendants in the counter claim expressed their willingness to terminate the power of attorney. So far as the aspect of accrual of cause of action is concerned, there are no averments made in the plaint or about the article in the schedule of the Limitation Act which will cover the period of limitation. However, at the hearing of the motion, the

learned counsel appearing for plaintiffs in the counter claim submits that the cause of action accrued to the plaintiffs when they received the notice dated 23rd June 2002 and according to him, two articles of the Limitation Act are applicable and those are Articles 54 and 58. Perusal of Article 54 shows that a suit for specific performance of the contract can be filed within a period of three years from the date fixed for performance of that contract and if no such date is fixed, within three years from the date when the plaintiffs noticed that performance is refused. As per Article 58, a right to institute a suit for decree of declaration accrues when the right to sue is accrued and the suit has to be instituted for such decree within a period of three years from the accrual of the cause of action. Perusal of the notice dated 23rd June 2004 shows that it is a notice issued by the defendants in the counter claim to the plaintiffs in the counter claim. in paragraph 1 of that notice, it is stated that the defendants in the counter claim have executed a power of attorney in favour of the plaintiffs. Then it is alleged that the power of attorney has been misused by the plaintiffs in the counter claim and therefore, the defendants have terminated that power of attorney and called upon to return the same. The relevant paragraph reads thus :-

> "You are aware that on account of various illegal acts done by you pursuant to the said power of attorney, our clients have terminated the power of attorney and called upon you to return the same."

. It is thus clear that if according to the plaintiffs in the counter claim, termination of power of attorney granted in their favour gives cause of action to them, then the power of attorney is not terminated by the letter dated 23rd June 2004. The original plaintiffs who are defendants in the counter claim have claimed that the power of attorney was terminated by letter dated 7th February 2000. That letter is to be found at Exh.'J' to the original plaint. The relevant paragraph of that letter reads as under :-

> "Our client also hereby terminate the agreement dated 1-10-89 as well as the power of attorney executed in pursuance of the said agreement in favour of your client and call upon your client to return the said power of attorney duly cancelled. Your client is also called upon not to take any steps in pursuance to the said power of attorney."

. Thus, if cancellation of power of attorney

gives cause of action to the plaintiffs in the counter claim, that cause of action will accrue in February 2000 and not in the year 2004 as claimed by the plaintiffs in the counter claim. It was submitted that the letter dated 7th February 2000 referred to above terminating the agreement as also the power of attorney was not acted upon. If that is so, then firstly it ought oto have been specifically plead. Perusal of the counter claim shows that the notice of February 2000 is not even referred to in the plaint. Secondly, when power of attorney given by a person is terminated by him, the termination does not require to be acted upon to make the termination effective. The termination becomes effective when the letter terminating the power of attorney was given. Therefore, accepting the case of the plaintiffs in the counter claim themselves at face value that termination of power of attorney gives cause of action to the plaintiffs in the counter claim to file the counter claim, then the cause of action will accrue in February 2000. Therefore, the counter claim filed on 18th august 2004 will not be maintainable in terms of the provisions of the Limitation Act. In so far as the counter claim is concerned, the date of filing of the counter claim is the date of instituting the suit. In the result therefore, the notice of motion is granted in terms of prayer clauses (a) and (b). Notice of motion is disposed off.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.